

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

SFA SYSTEMS, LLC, <div style="text-align: center;"><i>Plaintiff,</i></div> v. 1-800-FLOWERS.COM, INC., et al, <div style="text-align: center;"><i>Defendants.</i></div>	§ § § § § § § § § §	CASE NO. 6:09-cv-340 PATENT CASE
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SFA SYSTEMS, LLC, <div style="text-align: center;"><i>Plaintiff,</i></div> v. BIGMACHINES, INC., et al, <div style="text-align: center;"><i>Defendants.</i></div>	§ § § § § § § § § §	CASE NO. 6:10-cv-300 PATENT CASE
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**DEFENDANTS’ REPLY IN SUPPORT OF THEIR MOTION TO STRIKE
UNDISCLOSED EXTRINSIC EVIDENCE FROM SFA’S P.R. 4-5(c) BRIEF**

The Court should grant Defendants’ motion for two simple reasons, neither of which SFA can deny. First, even if SFA is correct that Rule 26(a)(2)(C) applies, SFA failed to serve its “rebuttal” evidence within the thirty-day period required by that rule. *See* Pl.’s Resp. Defs.’ Mot. Strike at 3 (rebuttal evidence must be served “within 30 days after the disclosure made by the other party”) (citing Fed. R. Civ. P. 26(a)(2)(C)).¹ Instead, SFA waited thirty-eight days after Defendants served Dr. Greenspun’s expert declaration unequivocally stating the precise facts SFA claims to now rebut. *Compare id.* at 1-2 (“The Defendants asserted that ‘both SFA and Mr. Myers fail to

¹ SFA’s reliance on Rule 26 itself strains credulity, in light of the plain requirements of this Court’s local patent rules, which establish a specific schedule for disclosure of extrinsic evidence. Further, the language SFA cites from Rule 26(a)(2)(C) begins with the phrase “In the absence of other directions,” making clear that this Court’s local patent rules control.

present a single dictionary definition to the Court”) *with* Defs.’ P.R. 4-5(b) Br., ex. A, Greenspun Decl. ¶ 43 (“Neither I nor the plaintiff and defendants was able to find a dictionary definition for the term ‘event manager.’”). Thus, SFA’s new extrinsic evidence is untimely even under Rule 26(a)(2)(C), in addition to this Court’s local patent rules 4-2 and 4-3.

Second, SFA’s new evidence is not “rebuttal” evidence at all. Far from rebutting any of Defendants’ or Dr. Greenspun’s positions, it is instead irrelevant material that at best confuses the issues. For one, SFA’s new dictionary still fails to provide a definition for the **claim term** “event manager” (which might be rebuttal evidence) but instead only provides one for another term not even found in the patent-in-suit. To bridge the gap, SFA merely provides a bare, conclusory attorney statement that (1) this new phrase is an “analogous term,” *see* Pl.’s P.R. 4-5(c) Reply Br. at 6 (failing to cite any expert or other evidence that a skilled artisan would consider SFA’s new phrase analogous to the claim term), and (2) that Mr. Myers’s “opinion is consistent with the [new] dictionary definition,” *see* Pl.’s Resp. Defs.’ Mot. Strike at 2 (failing to provide any explanation of how SFA’s new definition allegedly supports Mr. Myers’s opinion). SFA’s unsubstantiated attempt to pass off as “rebuttal” evidence what is no more than irrelevant evidence of what a phrase not found in the patent-in-suit means only confuses the issues.

But the ultimate reason why the Court should strike SFA’s new evidence is that it is *per se* irrelevant—not rebuttal—under well-established Federal Circuit precedent. *Phillips* and its progeny unequivocally hold that the focus remains solely on the disputed claim term’s meaning, if any, **at the time of the invention**:

We have made clear, moreover, that the ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.

Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005). SFA’s new dictionary definition, however, was first coined **four years** after the effective filing date of the patent-in-suit and first

published in a dictionary six years after. *See* Defs.’ *Markman* Presentation at Tyler Clerk’s Office Exhibit Room, slide 67 (establishing that SFA’s new definition “was first defined in the first quarter of 1999” and published in 2001). Accordingly, SFA’s new evidence is not competent rebuttal evidence at all because its publication date—which SFA omits—came about years after the effective filing date of the patent-in-suit.

This same flaw shines through SFA’s new reference to “a simple Lexis search of the patent database for utility patents issued prior to 2001” and exhibits F-P in its reply brief. *See* Pl.’s P.R. 4-5(c) Reply Br. at 8 (emphasis added). Again, the effective filing date of the patent-in-suit, 1995, not 2001, is the relevant focus. Moreover, nowhere does SFA establish, whether by attorney argument or expert declaration, that any usage of the term “event manager” in these new patents establishes a structural connotation, let alone a structural definition supporting SFA’s generic “hardware and/or software” construction. Simply put, definitions and usages of allegedly analogous terms four, five, six years later are irrelevant to the claim construction issues before the Court. *See Phillips*, 415 F.3d at 1313.

Accordingly, not only is SFA’s new evidence untimely under Rule 26(a)(2)(C), P.R. 4-2, and P.R. 4-3, but even if it were timely, it is not “rebuttal” evidence because (1) SFA fails to establish any connection between the claim term at issue and its new definition for a different phrase not even found in the patent-in-suit and (2) SFA’s new definition along with the majority of its newly cited patents post-date the claimed invention by many years. For these reasons and the reasons stated in Defendants’ motion to strike, Defendants respectfully request that the Court strike all new extrinsic evidence cited in SFA’s P.R. 4-5(c) claim construction reply brief.

Dated: April 13, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on April 13, 2011. Any other counsel of record will be served by first class mail.

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